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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAMAN K. TALWAR, Plaintiff and Respondent, v. FRANK YUSUF, Defendant and Appellant.	B271208 (Los Angeles County Super. Ct. No. MC025534)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Reversed.

Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport; Davis, Grass, Goldstein & Finlay, Steven B. Goldstein, and Carol A. Hoehn for Defendant and Appellant.

Law Office of Paul S. White and Paul S. White for Plaintiff and Respondent.

Appellant Frank Yusuf challenges the trial court's denial of his special motion to strike pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16 (§ 425.16).) Respondent Raman K. Talwar filed suit against Yusuf, alleging that Yusuf had made false statements regarding Talwar's treatment of a patient. We reverse.

FACTS AND PROCEEDINGS BELOW

At the time of the events at issue in this case, Talwar and Yusuf were both surgeons at Palmdale Regional Medical Center (the hospital). Yusuf was already working at the hospital when Talwar accepted a position performing vascular and other kinds of surgery.

In 2013, Talwar performed surgery to create an arteriovenous (AV) fistula in the left arm of a patient suffering from end-stage renal failure.[1] An AV fistula is a surgically created connection between a vein and an artery. In patients suffering renal failure, AV fistulas are created in order to allow for easier removal of blood in dialysis. Talwar believed the fistula was adequate and usable for dialysis, and that he had acted within the standard of care in creating it.

Soon afterward, the patient complained of post-operative complications, including numbness and tingling in his arm. Yusuf claims that while he was treating the patient in order to correct these issues, he concluded that the fistula Talwar had created was too deep to be accessible during dialysis. In an attempt to correct this issue, Yusuf performed another surgery on the patient. According to Yusuf, he was unable to salvage the existing fistula and had to create a second fistula in the same arm, which Yusuf asserts the patient currently uses for dialysis. For his part, Talwar denies that the first fistula was unusable, and contends that the

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[1] Out of respect for the patient's privacy, this opinion refers to him only as "the patient."

patient uses that fistula, rather than the one Yusuf created, for dialysis.

Talwar alleges that Yusuf reported Talwar to the hospital's quality assurance department and recommended that the hospital open an investigation. Talwar also alleges that Yusuf encouraged the patient to file a complaint against Talwar with the Medical Board of California (Medical Board), and to file a malpractice suit against him. According to Talwar, Yusuf took these actions because Talwar's presence in the hospital was taking vascular surgery business away from Yusuf and reducing Yusuf's income.

Following Yusuf's alleged recommendation, the patient filed a malpractice claim against Talwar in small claims court. The small claims court entered judgment in favor of Talwar, finding that because the patient had not introduced expert medical testimony to support his claim, he could not prove malpractice. The hospital's internal peer review committee determined that Talwar's technique in performing the surgery to create the fistula was within the standard of care, but that Talwar had failed to meet the standard of care by selecting the third best available location for creating the fistula. The Medical Board criticized Talwar for failing to keep thorough notes of his treatment of the patient, but closed its investigation without taking further action. According to Talwar, the hospital cancelled Talwar's contract and took away his privileges to perform AV fistula surgery.

Talwar filed suit against Yusuf, alleging causes of action for intentional and negligent interference with prospective economic relations, defamation, and violations of unfair competition law. Yusuf filed a special motion to strike Talwar's complaint in its entirety pursuant to the anti-SLAPP statute. He alleged that Talwar's causes of action arose from Yusuf's protected activity in exercising his free speech rights, and that Yusuf could not show a probability of success. The trial court denied the motion, finding

that Talwar's causes of action did not arise from protected activity, and that Yusuf had shown a probability of succeeding on the merits.

DISCUSSION

The anti-SLAPP provides that a defendant in a civil case may move to strike all or part of a complaint if it "aris[es] from any act of [the defendant] in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or cthe California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) If the plaintiff's cause of action falls within the statute's definition, the motion should be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Under the statute, the act in furtherance of a defendant's right of petition or free speech includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

In ruling on a motion to strike pursuant to section 425.16, a court must employ a two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 . . . .) If the defendant makes the required showing, the burden shifts to

the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

Yusuf contends that the trial court erred by denying his special motion to strike Talwar's complaint. The denial of a motion to dismiss a cause of action under the anti-SLAPP statute is immediately appealable. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) We review a trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

I. Arising from Protected Activity

In his complaint, Talwar alleged that Yusuf injured him by making two sets of statements. First, Talwar alleged that Yusuf reported Talwar's performance to the hospital's quality assurance department and encouraged the hospital to conduct an internal review of Talwar's performance. Second, Talwar alleged that Yusuf made false statements to the patient regarding Talwar's care, and recommended that the patient file a medical malpractice suit against Talwar and report Talwar to the Medical Board. We agree with Yusuf that all these statements are protected activity under the anti-SLAPP statute, and that Talwar's claims arise from them.

A. Statements to Peer Review Committee

In his complaint, Talwar alleged that "Yusuf reported the [patient] 'incident' to [the hospital]'s quality assurance department and encouraged [the hospital] to conduct an internal investigation of Talwar's performance, including but not limited to [the patient]'s fistula." Yusuf contends, and we agree, that these statements were protected activity because they were made before or in

connection with an "official proceeding authorized by law." (§ 425.16, subd. (e)(1) & (2).)[2]

In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199-200 (*Kibler*), our Supreme Court held that, for purposes of the anti-SLAPP statute, hospital peer review proceedings are official proceedings authorized by law. The Court reasoned (*ibid.*; accord, *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, 1282-1283) that hospitals are required by law to hold peer review proceedings (see Bus. & Prof. Code, § 805 et seq.), that these proceedings play a central role in allowing state licensing boards to regulate and discipline errant practitioners, and that a hospital's peer review decisions are reviewable by administrative mandate. (See Bus. & Prof. Code, § 809.8.) Talwar does not dispute that the quality assurance team to whom Yusuf allegedly reported Talwar for violating the standard of care was the peer review committee required by the Business and Professions Code.

Talwar argues that Yusuf's alleged statements to the peer review committee were nevertheless not protected activity. He points out that in *Kibler* the plaintiff alleged that a hospital's peer review committee injured him in the statements the committee itself made at the conclusion of a hearing. By contrast, Talwar's allegations concern statements Yusuf, who was not a member of the committee, is alleged to have made to committee members, at a time when there was no pending peer review proceeding regarding Talwar's conduct. We are not persuaded that this distinction is significant. The court in *Dorn v. Mendelzon* (1987)

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[2] Because we reach this conclusion, we need not determine whether the statements were also protected activity because they were "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

196 Cal.App.3d 933 (*Dorn*) held that "letters or communications designed to *prompt* official action are as much a part of an 'official proceeding' as a communication made after the proceeding has commenced." (*Id.* at p. 941.) *Dorn* involved a letter sent by a hospital administrator to the Board of Medical Quality Assurance regarding the substandard performance of a doctor at the hospital. (*Id.* at pp. 938-939.) The court reasoned that the absolute privilege for communications made in official proceedings authorized by law (Civ. Code, § 47, subd. (b) (§ 47, subd. (b)) protected the administrator's communication because "an administrative agency, to function effectively, must have an 'open channel' by which concerned persons may call attention to suspected wrongdoing. (Citation.) As a matter of public policy, '[t]he importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual.' " (*Dorn*, *supra*, 196 Cal.App.3d at pp. 941-942.)

Section 47, subdivision (b), like section 425.16, subdivision (e)(1) and (2), protects statements made before judicial proceedings and other proceedings authorized by law. For this reason, courts "have looked to the . . . privilege [established in section 47, subdivision (b)] as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision[] (e)(1) and (2)." (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 322–323.) By the same logic the court applied in *Dorn*, communications intended to prompt action are also protected activity for purposes of the anti-SLAPP statute. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009; *Mindys Cosmetics, Inc. v. Dakar* (9th Cir. 2010) 611 F.3d 590, 596.) Although this case involves communications by a doctor

to a peer review committee rather than a letter from a hospital administrator to the Board of Medical Quality Assurance, as in *Dorn*, we see no reason why the same reasoning should not apply in both contexts.

B. Statements to the Patient

Talwar alleged in his complaint that "Yusuf fraudulently and maliciously told [the patient] that Talwar negligently created the fistula and that [Yusuf] need[ed] to create a second fistula. Yusuf fraudulently and maliciously claimed that the fistula was too deep to use and was not accessible." Talwar claimed that later, "Yusuf solicited, recommended, encouraged and induced [the patient] to file a lawsuit against Talwar alleging medical malpractice." Talwar alleged further that "after [the patient] lost the medical malpractice lawsuit, Yusuf solicited, recommended, encouraged and induced [the patient] to file a complaint against Talwar with the Medical Board of California." Yusuf contends that these statements were protected activity in that they were "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).) We agree.

Courts have held that "[t]he anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation. (Citation.) Indeed, courts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.' " (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.) A prelitigation statement is protected so long as the statement " 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration." ' " (*Neville v.*

Chudacoff (2008) 160 Cal.App.4th 1255, 1268.) In determining the question of good faith, we ask whether " 'the statement [was] made with *a good faith belief in a legally viable claim*.' "[3] (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 790.)

In this case, the patient sued Talwar for medical malpractice and filed a complaint with the Medical Board shortly after Yusuf allegedly advised him to do so. Furthermore, the hospital's peer review committee concluded that Talwar had departed from the standard of care in treating the patient. This is strong evidence that the litigation was under serious contemplation, and that Yusuf acted in good faith in recommending that the patient sue for medical malpractice. The ultimate failure of that lawsuit is not to the contrary: The court in that case found in favor of Talwar not on the ground that Talwar had acted within the standard of care, but rather because the patient had failed to produce expert testimony on that issue. To establish that a statement is not protected, a plaintiff "must do more than simply 'assert[] that litigation to which the statement is related is without merit, and therefore the proponent of the litigation could not in good faith have believed it

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[3] In a case like this one, the question of whether the defendant had a good faith belief in the viability of the potential litigation is closely related to the analysis in step two of the anti-SLAPP inquiry regarding the plaintiff's possibility of succeeding on the merits. After all, if the defendant acted in good faith in recommending action against the plaintiff, it is unlikely that the plaintiff could win a lawsuit claiming that the defendant acted vindictively. Nevertheless, the case law requires us to address the defendant's good faith in the first step of the anti-SLAPP analysis. (See, e.g., *Neville v. Chudacoff*, *supra*, 160 Cal.App.4th at p. 1268, citing *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) This is because frivolous or baseless threats to sue are not protected activity at all and fail at the first step of the anti-SLAPP analysis. (See *Bailey v. Brewer*, *supra*, 197 Cal.App.4th at p. 793.)

had a legally viable claim.' " (See *Bailey v. Brewer*, *supra*, 197 Cal.App.4th at p. 790.)

The fact that Yusuf was not himself a party in the malpractice action against Talwar does not preclude him from protection. The purpose of the anti-SLAPP statute's protection of litigation-related statements is " 'to protect the right of litigants to " 'the utmost freedom of access to the courts.' " ' " (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) To uphold this purpose, it is necessary also to protect non-litigants: "If any person who induced another to bring a lawsuit involving a colorable claim could be liable in tort, free access to the courts could be choked off with an assiduous search for unnamed parties." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1136.)

Talwar contends that Yusuf's statements were not protected activity because he alleged that they were defamatory. We disagree. Although it is true, as Talwar points out, that "defamation of an individual is not protected by the constitutional right of free speech" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1131), this is not dispositive of an anti-SLAPP motion. " 'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his] actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous.' " (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419-420.) The critical question is not whether the plaintiff has alleged that the defendant's conduct is not constitutionally protected, but "whether the lawsuit is within one of the four descriptions of protected activity in subdivision (e) of section 425.16." (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 464.)

II. Probability of Success

Because Yusuf has shown that Talwar's claims are based on protected activity, Talwar bears the burden in the second step of the anti-SLAPP analysis to show a probability of success on the merits of his claims. (See *Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) Talwar has not met this burden. As we have already seen (see Discussion part I.A, *ante*), the privilege established in section 47, subdivision (b), applies to Yusuf's alleged statements to the hospital quality assurance department. Yusuf's alleged statements to the patient encouraging him to sue Talwar and to report him to the Medical Board were related to contemplated legal action; thus, the same privilege protects them as well.[4] (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195.) This privilege is "absolute and is unaffected by the existence of malice." (*Dorn*, *supra*, 196 Cal.App.3d at p. 941; accord, *Action Apartment Assn., Inc. v. City of Santa Monica*, *supra*, 41 Cal.4th at p. 1241.) Talwar cannot succeed in his claims because the privilege precludes liability for Yusuf's statements.[5]

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[4] Talwar contends that the privilege does not apply because the patient's litigation against him was not "imminent." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 36.) But litigation is imminent for purposes of the privilege so long as a dispute is ongoing and a suit was filed within months, rather than years, of a defendant's statement. (See *Neville v. Chudacoff*, *supra*, 160 Cal.App.4th at pp. 1268–1269.) In this case, the patient filed suit against Talwar within six months of Yusuf's alleged statements.

[5] Because the privilege under section 47, subdivision (b) protects Yusuf's alleged communications, we need not consider Yusuf's contention these statements are also protected by the privileges established in section 43.8 and section 47, subdivision (c) of the Civil Code.

Because all of Talwar's claims are based on protected activity, and Talwar has failed to demonstrate a probability of success with respect to any of these claims, Yusuf's special motion to strike must be granted. (See § 425.16, subd. (b)(1).)

DISPOSITION

The judgment of the trial court is reversed. Appellant is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.